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No. 80-74

In the Supreme Court of the United States

OCTOBER TERM, 1979

MELESIO MANUEL TAPIA-ACUNA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether an alien facing deportation for a drug-related conviction is eligible for discretionary relief under 8 U.S.C. 1182(c).

2. Whether respondent may be deported under 8 U.S.C. 1251(a)(1) for a drug-related conviction that has been expunged pursuant to Arizona law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. IX–XII) is not reported. The opinions of the Board of Immigration Appeals (Pet. App. I–VIII) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1980. A petition for rehearing was denied on June 12, 1980 (Pet. App. XIII). The petition for a writ of certiorari was filed on July 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

8 U.S.C. 1182(c) provides in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30) and (31) of subsection (a) of this section.

8 U.S.C. 1251(a) (11) provides in pertinent part:

> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> (11) is, or hereafter at any time after entry has been * * * convicted of a violation of * * * any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has

> been convicted of a violation of * * * any law or regulation governing or controlling the * * * sale, exchange, dispensing, giving away * * * or the possession for the purpose of the * * * sale, exchange, dispensing, [or] giving away * * * of * * * marihuana * * *.

STATEMENT

Petitioner, a native and citizen of Mexico, entered the United States in 1963 as an alien lawfully admitted for permanent residence (R. 19).[1] In June 1971, he was apprehended for having falsely claimed United States citizenship, but the disposition of that charge is not clear from the record (R. 64).[2] On October 25, 1976, petitioner pleaded guilty in the Superior Court of the State of Arizona to unlawfully possessing for sale 386 pounds of marijuana, in violation of Ariz. Rev. Stat. Ann. § 36–1002.06 (1974). Imposition of sentence was suspended for three years, conditioned, *inter alia*, on petitioner's payment of a $330 fine (R. 22, 77–78).

On February 15, 1977, the Immigration and Naturalization Service ordered petitioner to show cause why he should not be deported pursuant to 8 U.S.C. 1251(a)(11) on account of the marijuana conviction (R. 86). During the hearing to show cause, petitioner applied for a waiver of excludability pursuant to 8

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[1] "R." refers to the certified administrative record.

[2] Although the immigration judge found that petitioner had been granted voluntary departure on June 23, 1971 (R. 23), petitioner testified that he did not leave the country at that time (R. 38). Moreover, it does not appear that petitioner was the subject of deportation proceedings or was found deportable on that occasion.

U.S.C. 1182(c) (R. 19). In an oral decision (R. 19–25), the immigration judge ordered petitioner deported and denied him relief under Section 1182(c). He found that petitioner had been granted voluntary departure to Mexico in June 1971, which had interrupted the seven years' unrelinquished domicile required by Section 1182(c) (R. 23–24; but see note 2, *supra*). Moreover, the judge found (R. 24) that even if petitioner were eligible for Section 1182(c) relief, he would deny it in the exercise of his administrative discretion.[3]

Thereafter, in May 1977, petitioner's state conviction was set aside pursuant to the Arizona expunction statute, Ariz. Rev. Stat. Ann. § 13–907 (1978) (formerly Ariz. Rev. Stat. Ann. § 13–1744 (1976)). On September 25, 1978, the Board of Immigration Appeals affirmed the immigration judge's decision "in the exercise of [its] administrative discretion" (Pet. App. I–IV). The Board, however, had not been informed of the expunction of petitioner's marijuana conviction.

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[3] In so holding, the immigration judge relied (R. 24) on the following: (i) on November 7, 1971, petitioner was discovered with two others in a car containing 50 pounds of marijuana (R. 21, 39–42, 66, 68–69). Although the indictment against petitioner was dismissed (R. 71), the immigration judge, after hearing petitioner's account of the incident, concluded (R. 23) that the dismissal "was more than likely not because of any belief as to his innocence, but because of the technical difficulty in making the charge stick." (ii) On April 10, 1972, petitioner was discovered driving a car in which marijuana debris was found. Petitioner was told to report to the Nogales, Arizona, immigration office on the following day with his wife and father. At that time, the seriousness of petitioner's having been involved with marijuana on at least two occasions was explained to petitioner, his wife, and his father, and they were warned that "subsequent violations would surely lead to [petitioner's] deportation from the United States" (R. 72; accord, R. 21, 43).

Accordingly, petitioner moved the Board to reconsider his case. The Board denied the motion, holding that deportation may be based on an expunged conviction and that Section 1182(c) relief is unavailable in the Ninth Circuit to an alien facing deportation for a drug offense (Pet. App. V–VIII). The court of appeals affirmed (Pet. App. IX–XII).[4]

DISCUSSION

1. Petitioner correctly points out (Pet. 9–10) that there is a conflict among the circuits concerning whether an alien who has been convicted of and ordered deported for a drug-related offense is eligible to apply for discretionary relief under 8 U.S.C. 1182(c). On the one hand, the Ninth Circuit has held that aliens who have been ordered deported for drug-related offenses are not eligible for discretionary relief under Section 1182(c). *Bowe* v. *INS*, 597 F.2d 1158 (1979); *Nicholas* v. *INS*, 590 F.2d 802, 808 (1979). As the opinions in *Bowe* and *Nicholas* reveal, however, the Ninth Circuit's position in those cases arose, without further analysis, from a series of cases, which happened to involve convictions for drug offenses, in which the court denied eligibility for Section 1182(c) relief on the ground that the alien had not departed from and returned to this country subsequent to the

[4]Petitioner's request for review by the court of appeals was filed from the Board's initial decision, and petitioner filed no additional petition for review after the Board denied his motion to reopen and reconsider (Pet. App. XII n.3). Since the court of appeals had stayed its proceedings until the Board ruled on petitioner's motion to reopen, however, the court's ruling took into account the expunction of petitioner's Arizona conviction (Pet. App. X–XI).

conviction on which his deportation was based. See *Castillo-Felix* v. *INS*, 601 F.2d 459, 462 n.6 (1979); *Dunn* v. *INS*, 499 F.2d 856, 857–858 (1974), cert. denied, 419 U.S. 1106 (1975); *Arias-Uribe* v. *INS*, 466 F.2d 1198, 1199–1200 (1972).[5] On the other hand, the Second and the Tenth Circuits have held or assumed that aliens who have been ordered deported for violating drug laws are eligible for Section 1182(c) relief regardless of whether they have been deported from and returned to this country subsequent to the time when the ground for deportation arose. *Vissian* v. *INS*, 548 F.2d 325 (10th Cir. 1977); *Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976).[6] See also *Byus-Narvaez* v. *INS*, 601 F.2d 879, 881 n.5 (5th Cir. 1979).

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[5] 8 U.S.C. 1182(c) has been construed to permit aliens who have committed deportable offenses and thereafter left the United States but were not excluded upon their return to apply for Section 1182(c) relief "nunc pro tunc" in a subsequent deportation hearing, on the theory that the discretionary relief that would have been available to them on reentry could be granted at the later deportation hearing. *Castillo-Felix* v. *INS*, *supra*, 601 F.2d at 462 n.5.

Eligibility for relief under Section 1182(c) has also been extended to deportation proceedings in which an alien has requested adjustment of status under 8 U.S.C. 1255. *In re Smith*, 11 I. & N. Dec. 325 (BIA 1965).

[6] In *Francis*, the Second Circuit held that the Ninth Circuit's construction of 8 U.S.C. 1182(c) in *Arias-Uribe* and *Dunn* as requiring an actual departure and return to the United States subsequent to the conviction on which deportation was based, although consistent with the statutory language, impermissibly and irrationally "creates two classes of aliens identical in every respect except for the fact that members of [the preferred] class have departed and returned to this country at some point after they became deportable" (532 F.2d at 272). In so holding, the Second Circuit assumed that aliens convicted of drug offenses are eligible for relief under Section 1182(c).

Following the Second Circuit's decision in *Francis*, the Board of Immigration Appeals has found aliens with drug convictions eligible for Section 1182(c) relief. *In re Marin*, 16 I. & N. Dec. 581 (1978); *In re Varagianis*, 16 I. & N. Dec. 48 (1976); *In re Silva*, 16 I. & N. Dec. 26 (1976). However, over the objections of the Immigration and Naturalization Service, the Board has applied a different rule in cases, like the present one, that have arisen in the Ninth Circuit, because the Board has felt itself bound by that court's decisions in *Bowe* and *Nicholas* (see Pet. App. VII–VIII & n.2).

In the government's view, the Ninth Circuit's position is without support in either the statutory language of Section 1182(c) or the case law on which the court of appeals has relied. See pages 4–5, *supra*. The INS believes that it is sufficient for the proper administration of the Nation's immigration program that the fact and nature of a drug conviction be taken into account in the discretionary aspect of the determination whether Section 1182(c) relief should be granted. See *In re Marin, supra*.

In this case, the INS urged the court of appeals to affirm the Board's order on the ground that "[t]his Court [the Ninth Circuit] has held * * * that relief under [8 U.S.C. 1182(c)] is unavailable to an alien facing deportation for conviction of a drug related crime" (Resp. Br. 7–8). This statement, although a correct summarization of the Ninth Circuit's precedents, does not reflect the government's current position that those precedents are erroneous and should be overruled. We submit, therefore, that the judgment below should be vacated and the case remanded to the court

of appeals for reconsideration in light of the position now advanced by the INS.

2. In view of the disposition we have urged above, the Court need not reach petitioner's contention that his expunged conviction could not serve as a basis for deportation under 8 U.S.C. 1251(a)(11). In any event, there is no merit to that claim.

Deportation is a matter of congressional policy (*Kleindienst* v. *Mandel*, 408 U.S. 753, 766–767 (1972)) and does not depend upon the fortuity of state law. The cases relied on by petitioner represent an exception (for which petitioner does not qualify, see pages 10–11, *infra*) to the general rule that an expunction under state law does not preclude use of the expunged conviction as a basis for deportation for a drug offense under 8 U.S.C. 1251(a)(11). *Ocon-Perez* v. *INS*, 550 F.2d 1153, 1154 (9th Cir. 1977); *Kolios* v. *INS*, 532 F.2d 786 (1st Cir.), cert. denied, 429 U.S. 884 (1976); *Gutierrez-Rubio* v. *INS*, 453 F.2d 1243, 1244 (5th Cir. 1972); *Gonzalez de Lara* v. *United States*, 439 F.2d 1316, 1318–1319 (5th Cir. 1971); *de la Cruz-Martinez* v. *INS*, 404 F.2d 1198, 1200 (9th Cir. 1968), cert. denied, 394 U.S. 955 (1969).

In *Mestre Morera* v. *INS*, 462 F.2d 1030 (1st Cir. 1972), the court of appeals held that an alien may not be deported on the basis of a narcotics conviction that had been expunged pursuant to a federal statute—the Federal Youth Correction Act, 18 U.S.C. 5005 *et seq.* The court emphasized (462 F.2d at 1032) that the Act's purpose "is to relieve [the youthful offender] not only of the usual disabilities of a criminal conviction, but also to give him a second chance free of

a record tainted by such a conviction." It distinguished 18 U.S.C. 5021 from state expunction statutes on the ground (*ibid.*) that the former "clearly contemplates more than a 'technical erasure;' it expresses a Congressional concern, which we cannot say to be any less strong than its concern with narcotics, that juvenile offenders be afforded an opportunity to atone for their youthful indiscretions."[7] Accord, *In re Zingis*, 14 I. & N. Dec. 621 (BIA 1974).

In *Rehman* v. *INS*, 544 F.2d 71 (2d Cir. 1976), a divided panel of the court of appeals set aside a deportation order based on a conviction for "simple knowing possession[,] * * * New York's lowest grade drug offense" (*id.* at 72), which had been expunged under New York law. The basis for the court's decision, however, was federal policy, not state law. Specifically, the court found that if Rehman had been tried under federal law, he most likely would not have been deportable because, under 21 U.S.C. 844, "a first-offender guilty of simple possession of drugs can in the discretion of the court be placed on probation and never actually be convicted at all" (544 F.2d at 74). Moreover, under 18 U.S.C. 4216, a court may, "after taking into consideration the previous record of the defendant as to delinquency or criminal experience," sentence a "young adult offender" (one between the ages of 22 and 25) under the Federal Youth Corrections Act, expunction under which precludes deportation on the basis of the expunged conviction. *Mestre Morera* v. *INS*, *supra*; *In re Zingis*, *supra*.

[7] Indeed, in the subsequent case of *Kolios* v. *INS*, *supra*, the First Circuit upheld a deportation order based on a narcotics conviction that had been expunged under state law.

The INS recognizes, for deportation purposes, such congressionally-authorized expunctions as well as their state counterparts. See *In re Werk*, 16 I. & N. Dec. 234 (BIA 1977) (deportation proceedings terminated as improvidently begun where based on marijuana possession conviction that had been expunged pursuant to Wisconsin counterpart to 21 U.S.C. 844); *In re Andrade*, 14 I. & N. Dec. 651 (BIA 1974) (deportation proceedings terminated where based on a minor's marijuana possession conviction that had been expunged pursuant to California youth offender statute, but noting (*id.* at 654) that "this position does not apply * * * to expungement under state laws that do not have a federal counterpart"); *In re Zingis*, *supra*.

The Arizona statute under which petitioner's conviction was expunged has no federal counterpart.[8] It is

[8] Ariz. Rev. Stat. Ann. § 13–907 (1978) provides in pertinent part:

> Every person convicted of a criminal offense * * * may upon fulfillment of the conditions of probation or sentence and discharge by the court, apply to the judge, justice of the peace or magistrate who pronounced sentence or imposed probation or such judge, justice of the peace or magistrate's successor in office to have the judgment of guilt set aside. The convicted person shall be informed of this right at the time of discharge. The application to set aside the judgment may be made by the convicted person, by his attorney or probation officer authorized in writing. If the judge, justice of the peace or magistrate grants the application, the judge, justice of the peace or magistrate shall set aside the judgment of guilt, dismiss the accusations or information and order that the person be released from all penalties and disabilities resulting from the conviction * * * except that the conviction may be pleaded and proved in any subsequent prosecution of such person by the state or any of its subdivisions for any offense * * * as if the judgment of guilt had not been set aside.

limited neither to the convictions of youthful offenders nor to convictions for the simple possession of drugs.[9] In addition, its purpose is not to render a record untainted by conviction for all purposes, but merely to reward a convicted person for good behavior during the service of his sentence by releasing him from certain disabilities otherwise imposed by Arizona law. Cf. *Garcia-Gonzales* v. *INS*, 344 F.2d 804, 808 (9th Cir. 1965). Thus, the Arizona statute provides that the expunged conviction "may be pleaded and proved in any subsequent prosecution of such person by the state or any of its subdivisions for any offense * * * as if the judgment of guilt had not been set aside."[10]

In any event, petitioner was convicted not of simple possession of drugs but of possession *for sale* of 386 pounds of marijuana. Moreover, although petitioner was 24 at the time of his conviction, in light of the offense charged and petitioner's record of repeated involvement with marijuana (see note 3, *supra*) it is

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[9] In his concurring opinion in *Rehman* v. *INS*, *supra*, Judge Mansfield emphasized (544 F.2d at 75) that under the New York expunction statute a "Certificate of Relief from Disabilities" is awarded simultaneously with the judgment, thus "prevent[ing] the state court's adjudication of guilt from amounting to a conviction." Under the Arizona expunction statute, on the other hand, a conviction remains in full force until the conditions of sentence or probation are satisfactorily fulfilled (see note 8, *supra*).

[10] Expunction under the Arizona statute does not eliminate the conviction as a basis for a federal conviction under 18 U.S.C. 922(h) for possession of a firearm by a convicted felon. *United States* v. *Herrell*, 588 F.2d 711, 713 (9th Cir. 1978).

highly unlikely that he would have been accorded youthful offender treatment under federal law.[11]

CONCLUSION

The petition for a writ of certiorari should be granted only as to the first issue presented, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for reconsideration in light of the position now advanced by the government.

Respectfully submitted.

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[11] Petitioner's reliance (Pet. 8) on *In re J___*, 7 I. & N. Dec. 580 (BIA 1957), is misplaced. In that case, the Board held that a disposition of a case that postponed the imposition of sentence, "unlike one which *suspended* the imposition of sentence," did not result in a conviction for the purpose of deportation (*id.* at 581 (emphasis in original)). Imposition of petitioner's sentence, of course, was suspended on the condition, *inter alia*, that he pay a $330 fine (Pet. 3; R. 22, 77–78). See *In re Varagianis*, 16 I. & N. Dec. 48, 49–50 (BIA 1976).

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